

AMENDED IN ASSEMBLY AUGUST 27, 2015

AMENDED IN ASSEMBLY JULY 16, 2015

AMENDED IN ASSEMBLY JULY 8, 2015

**SENATE BILL**

**No. 641**

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**Introduced by Senator Wieckowski**

February 27, 2015

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An act to add Section 1788.61 to the Civil Code, relating to debt buying.

LEGISLATIVE COUNSEL'S DIGEST

SB 641, as amended, Wieckowski. Debt buying: default judgment.

(1) Existing law, the Fair Debt Buying Practices Act, regulates the practice of buying charged-off consumer debt, as defined, sold or resold on or after January 1, 2014, for collection purposes and prescribes the circumstances pursuant to which the debt buyer may bring suit. The act prohibits a court from entering a default or other judgment in an action initiated by a debt buyer against a debtor unless business records, authenticated through a sworn declaration, are submitted by the debt buyer to the court to establish the facts required to be alleged, as specified.

This bill would permit a person to serve and file a notice of motion and motion to set aside a default or default judgment and for leave to defend an action relating to debt, if service of a summons did not result in actual notice to the person in time to defend an action brought by a debt buyer and a default or default judgment has been entered against the person in the action. The bill would require the person to make this service and filing within 6 years after entry of the default judgment or 180 days of the first actual notice of the action, whichever is earlier,

except in cases of identity theft or mistaken identity, in which case the service and filing is to be made within 180 days of the first actual notice of the action. *The bill would prescribe requirements regarding documents to be submitted to a court in instances of identity theft or mistaken identity.* The bill would prescribe requirements for the filing, which would include an affidavit submitted to the court under oath ~~showing~~ *stating* that the person's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. By expanding the crime of perjury, the bill would impose a state-mandated local program. The bill would permit a court to set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action. The bill would apply to a judgment entered on and after January 1, 2010, except as specified.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1     SECTION 1. Section 1788.61 is added to the Civil Code, to  
2     read:  
3     1788.61. (a) (1) Notwithstanding Section 473.5 of the Code  
4     of Civil Procedure, if service of a summons has not resulted in  
5     actual notice to a person in time to defend an action brought by a  
6     debt buyer and a default or default judgment has been entered  
7     against the person in the action, the person may serve and file a  
8     notice of motion and motion to set aside the default or default  
9     judgment and for leave to defend the action.  
10    (2) Except as provided in paragraph (3), the notice of motion  
11    shall be served and filed within a reasonable time, but in no event  
12    exceeding the earlier of:  
13    (A) Six years after entry of the default or default judgment  
14    against the person.  
15    (B) One hundred eighty days of the first actual notice of the  
16    action.

1 (3) (A) Notwithstanding paragraph (2), in the case of identity  
2 theft or mistaken identity, the notice of motion shall be served and  
3 filed within a reasonable time, but in no event exceeding 180 days  
4 of the first actual notice of the action.

5 (B) (i) *In the case of identity theft, the person alleging that he*  
6 *or she is a victim of identity theft shall provide the court with either*  
7 *a copy of a Federal Trade Commission Identity Theft Victim's*  
8 *Complaint and Affidavit or a copy of a police report filed by the*  
9 *person alleging that he or she is the victim of an identity theft*  
10 *crime, including, but not limited to, a violation of Section 530.5*  
11 *of the Penal Code, for the specific debt associated with the*  
12 *judgment.*

13 (ii) *In the case of mistaken identity, the moving party shall*  
14 *provide relevant information or documentation to support the*  
15 *claim that he or she is not the party named in the judgment or is*  
16 *not the person who incurred or owes the debt.*

17 (b) A notice of motion to set aside a default or default judgment  
18 and for leave to defend the action shall designate as the time for  
19 making the motion a date prescribed by Section 1005 of the Code  
20 of Civil Procedure, and it shall be accompanied by an affidavit  
21 ~~showing~~ *stating* under oath that the person's lack of actual notice  
22 in time to defend the action was not caused by his or her avoidance  
23 of service or inexcusable neglect. The person shall serve and file  
24 with the notice a copy of the answer, motion, or other pleading  
25 proposed to be filed in the action. ~~In contesting the motion to set~~  
26 ~~aside the judgment or default judgment, a debt buyer may~~  
27 ~~introduce, and the court may consider, evidence relating to the~~  
28 ~~document retention policies of~~ *Either party may introduce, and*  
29 *the court may consider, evidence in support of its motion or*  
30 *opposition, including evidence relating to the process server who*  
31 *appears on the proof of service of the summons and complaint.*

32 (c) Upon a finding by the court that the motion was made within  
33 the period permitted by subdivision (a) and that the person's lack  
34 of actual notice in time to defend the action was not caused by his  
35 or her avoidance of service or inexcusable neglect, the court may  
36 set aside the default or default judgment on whatever terms as may  
37 be just and allow the party to defend the action. If the validity of  
38 the judgment is not challenged, the court may select an appropriate  
39 remedy other than setting aside the default or default judgment.

1 (d) This section shall apply to a default or default judgment  
2 entered on or after January 1, 2010, except in the case of identity  
3 theft or mistaken identity, in which case this section shall apply  
4 regardless of the date of the default or default judgment.

5 (e) This section shall not limit the equitable authority of the  
6 court or other available remedies under law.

7 SEC. 2. No reimbursement is required by this act pursuant to  
8 Section 6 of Article XIII B of the California Constitution because  
9 the only costs that may be incurred by a local agency or school  
10 district will be incurred because this act creates a new crime or  
11 infraction, eliminates a crime or infraction, or changes the penalty  
12 for a crime or infraction, within the meaning of Section 17556 of  
13 the Government Code, or changes the definition of a crime within  
14 the meaning of Section 6 of Article XIII B of the California  
15 Constitution.